MOL LOGISTICS (MALAYSIA) SDN BHD A

v.

BANK OF TOKYO-MITSUBISHI (MALAYSIA) BHD

HIGH COURT MALAYA, KUALA LUMPUR B
HASNAH MOHAMMED HASHIM JC
[SUIT NO: D22-7-2008]
7 FEBRUARY 2011

BANKING: *Banker and customer - Authorisation - Whether defendant* C
authorised to debit sum from plaintiff's account - Whether there is valid authorisation - Whether defendant exercised reasonable skill and care in executing plaintiff's order - Whether defendant aware of forged signature on Cashier's Order - Whether Cashier's Orders collected by authorised personnel of plaintiff - Whether defendant acted reasonable and exercised D
care in discharging their duties - Whether defendant was negligent in discharging their duty - Whether defendant indebted to plaintiff

EVIDENCE: *Expert evidence - Handwriting - Whether expert evidence conclusive or merely to assist court - Forgery - Whether signatures forged* E
- Whether expert evidence was challenged by defendant

EVIDENCE: *Burden of proof - Forgery of signature - Whether plaintiff proved forgery on a balance of probabilities*

The plaintiff, a customer of the defendant, had maintained a F
current account with the defendant. The plaintiff had issued a mandate to the defendant to honour all the cheques drawn on the plaintiff's account with the defendant and to issue the plaintiff with cashier's order when so requested with a proviso that the said cheques and the application for cashier's order were signed by G
Zabri Ismail (PW1) and Kazuro Moriki (PW2) on behalf of the plaintiff. Between 20 December 2005 and 5 January 2006, the defendant had issued four cashier's orders purportedly at the request of the plaintiff and debited from the plaintiff's account the sum of RM287,850. The plaintiff pleaded that they had neither H
applied nor authorized the application of the cashier's orders and that the purported signatures of the authorized signatories of the plaintiff on the applications were forged. It was further alleged that between 20 December 2005 and 27 December 2005, the defendant had issued three cashier's orders purportedly at the I
request of the plaintiff and debited the plaintiffs account with the sum of RM10,460. The plaintiff now claims repayment of the said

A sum of RM287,850 and RM10,460. The defendant contended that the plaintiff had undertaken and agreed to indemnify the defendant *vide* letter of authority dated 17 October 1994. The issues that arose for consideration were (i) whether the application forms for the cashier's orders were signed by the plaintiff's
B authorized signatories, *ie*, PW1 and PW2 (ii) whether or not the cashier's orders when ready were duly collected by an authorized personnel of the plaintiff in accordance with agreed practice (iii) whether the defendant was entitled to debit the plaintiff's account in the sum of RM287,850 and RM10,460 notwithstanding that
C the seven impugned application forms for the cashier's orders contained forged signatures of the plaintiff's authorized signatories and (iv) whether the defendant was indebted to the plaintiff in the cumulative sum of RM298,310.

D **Held (allowing the plaintiff's claim with cost):**

(1) The standard of proof in a case involving forgery is on a balance of probabilities (*United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd*). The evidence by a handwriting
E expert can never be conclusive because it was only opinion evidence. It is trite law that the principal object of expert evidence was merely to assist the court to form its own opinion. The forensic expert had given clear and unwavering testimony with regard to the authenticity of the signatures of
F PW1 and PW2. She had tendered her report of her findings that the signatures were forged and her evidence was not challenged by the defendant. On the balance of probabilities, the signatures of PW1 and PW2 on the four cashier's orders were forged signatures. (paras 32, 37 & 38)

G **(2)** When another person came to collect the cashier's order, the defendant did not take any steps to verify with the plaintiff as to the change of the person collecting and the purpose. It was agreed that the defendant would be furnished with the details of the plaintiff's employees who would collect the
H cashier's orders and acknowledged receipt of the same by signing on the application forms and using the appropriate rubber stamp. It was regular and clear practice accepted by the parties and the defendant should have exercised reasonable skill and care by verifying with the plaintiff if there were any
I changes in the practice. (paras 42 & 43)

(3) At common law, the liability of a banker was founded on the tort of conversion, which was a tort of strict liability. A banker who had paid out on a forged instrument drawn from his customer's account was liable to make good the loss. It was an implied term of the mandate that the defendant would exercise reasonable skill and care in the execution of the plaintiff's orders which the plaintiff may make on the defendant from time to time. (paras 44 & 53)

(4) The indemnity was effective only if the defendant was not negligent and had complied with the mandate as agreed upon. The defendant had negligently issued the cashier's orders without authority or mandate of the plaintiff and therefore was liable to the plaintiff. The plaintiff had proven their claim against the defendant on a balance of probabilities. (paras 53, 54 & 55)

Case(s) referred to:

Dr Shanmuganathan v. Periasamy Sithambaram Piliai [1997] 2 CLJ 153 FC ***(refd)***

Murarilal v. State Of MP AIR [1980] SC 531 ***(refd)***

Proven Development Sdn Bhd v. Hongkong & Shanghai Banking Corp [1998] 5 CLJ 644 HC ***(refd)***

Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd [1986] AC 80 ***(refd)***

The Kepitigalla Rubber Estates Ltd v. The National Bank Of India Ltd [1909] 2 KB 1010 ***(refd)***

United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd [1993] 2 CLJ 31; [1993] 2 BLJ 8 SC ***(refd)***

Legislation referred to:

Bills of Exchange Act 1949, ss. 24, 73A

Evidence Act 1950, s. 45

For the plaintiff - SS Muker (Steven Puung with him); M/s Lovelace & Hastings

For the defendant - SK Sivam; M/s PG Lim

Reported by Kumitha Abdul Majid

A

JUDGMENT

Hasnah Mohammed Hashim JC:

Background

B **[1]** The plaintiff is a company incorporated in Malaysia and was a customer of the defendant. The plaintiff maintained a current account no. 133221 with the defendant. The plaintiff had issued a mandate to the defendant to honour all the cheques drawn on the plaintiff's account with the defendant and to issue the plaintiff
C with cashier's order when so requested with a proviso that the said cheques and the application for cashier's order are signed by Kazuro Moriki and Zabri Ismail, the Managing Director and the Assistant General Manager respectively on behalf of the plaintiff.

D **[2]** Between 20 December 2005 and 5 January 2006 the defendant issued four cashier's orders purportedly at the request of the plaintiff and debited the plaintiff's account the sum of RM287,850. The plaintiff in their statement of claim states that they had neither applied nor authorized the application of the
E cashier's orders and that the purported signatures of the authorized signatories of the plaintiff on the applications were forged.

[3] It was further alleged that between 20 December 2005 and
F 27 December 2005 the defendant issued three cashier's orders purportedly at the request of the plaintiff and debited the plaintiff's account with the sum of RM10,460. The plaintiff now claims repayment of the said sum of RM287,850 and RM10,460. Despite repeated demands the defendant has failed neglected and/
G or refused to credit the plaintiff's account the said sum.

[4] The plaintiff claims as follows:

(a) The refund of the sum of RM287,850 being the amount wrongfully debited from its account by the defendant in
H respect of the four cashier's orders issued by the defendant, the issuance the plaintiff maintains was not mandated and/or applied for by the plaintiff.

(b) The refund of the sum of RM10,460 being the amount the
I defendant wrongfully debited the plaintiff's account in respect of three cashier's orders issued by the defendant, the issuance

the plaintiff maintains was not mandated and/or applied for by the plaintiff. Although the said three cashier's orders were not encashed and their validity period has expired, the defendant has refused to credit the plaintiff's account with said sum of RM10,460.

(c) A declaration that the defendant has wrongfully debited the plaintiff's account with sum of RM287,850 and RM10,460.

(d) Interest at the rate of 8% per annum on the various sums debited against the plaintiff's account from the dates as stipulated in paragraph s. 6 and 9 of the statement of claim to the date of full payment.

(e) Costs of this suit.

The Plaintiff's Case

[5] The plaintiff contends that the defendant had issued the four cashier's orders for the plaintiff and had debited the plaintiff's account the sum of RM287,850 even though the plaintiff did not apply for the aforesaid cashier's order. It is the contention of the plaintiff that the signatures on the application were not the signatures of the authorized signatories of the plaintiff and were in fact forged signatures. Accordingly, the defendant has no authority to issue the said four cashier's orders and is not authorized to debit the plaintiff's account with the sum of RM287,850.

[6] The plaintiff further contends that the defendant had issued three other cashier's orders purportedly at the request of the plaintiff. The defendant debited the plaintiff's account in the sum of RM10,460. However, the three cashier's orders were not negotiated but the defendant did not credit the plaintiff's account as the plaintiff refused to sign an indemnity.

The Defendant's Case

[7] The plaintiff had issued to the defendant mandate to honour cheques drawn on the plaintiff's account with the defendant and also to issue to the plaintiff cashier's orders upon application by plaintiff. A special arrangement was entered into between the plaintiff and the defendant. By this special arrangement the plaintiff is allowed to apply to the defendant for cashier's orders utilizing

defendant's application forms for cashier's orders and submitting them to the defendant without the plaintiff having to draw cheques in favour of the defendant for the amount applied for. Upon the issuance of the cashier's orders applied for the defendant is authorized to debit from time to time the plaintiff's current account without having to draw cheques with the amounts stated in the cashier's orders. This arrangement is evidenced by the letter of authority dated 17 October 1994.

[8] The defendant contends that in consideration of the special arrangement stated above the plaintiff had agreed to indemnify the defendant and at all times keep the defendant fully indemnified from and against all liabilities, claims, demands, actions, losses and expenses of whatsoever nature and description howsoever arising. The defendant issued four cashier's orders at the request of the plaintiff and debited the plaintiff's account accordingly with the sum of RM287,850. The defendant contends that the plaintiff had applied for the said four cashier's orders by obtaining and filing the applications for the said cashier's orders and that they were duly signed by the plaintiff's authorized officers.

[9] It is the contention of the defendant that the plaintiff is not entitled to bring this claim as the plaintiff had undertaken and agreed to indemnify the defendant by a letter of authority dated 17 October 1994. The defendant further asserts that having executed the said letter the plaintiff is therefore liable to indemnify and as such the plaintiff is liable to bear the losses and any claim against the defendant is unsustainable.

[10] With regards to the claim of RM10,460 the defendant contends that the plaintiff have refused to sign an indemnity for the said sum for the defendant to release the sum. However the defendant is prepared to release the sum on the basis of the court order.

[11] Issues To Be Tried

(i) Whether the application forms for the cashier's orders particulars whereof are stated below were signed by the plaintiff's authorized signatories namely Mr Kazuro Moriki and Encik Zambri bin Ismail.

	Cashiers No. Order	Date of Cashiers Order	Amount
i.	117140	20.12.2005	RM 43,620.00
ii.	117186	27.12.2005	RM 82,320.00
iii.	117187	27.12.2005	RM 68,630.00
iv.	118230	5.1.2006	RM 93,280.00
			RM287,850.00

(ii) Whether or not the cashier's orders when ready were duly collected by the authorized personnel of the plaintiff in accordance with agreed practice between the parties. The defendant would be furnished by the plaintiff with the details of the plaintiff's employee who would collect the said cashier's orders and acknowledge receipt of the same by signing on the application for cashier's orders forms and use the appropriate rubber stamp.

(iii) Whether or not the plaintiff had authorized the defendant to debit the plaintiff's account by virtue of the plaintiff having signed the letter of authority/indemnity drawing without cheques dated 17 October 1994.

(iv) Whether or not the plaintiff had duly authorized the defendant to issue three cashier's orders totaling RM10,460 and for the defendant to debit the plaintiff's account.

(v) Whether or not the defendant is entitled to debit the plaintiff's account with the defendant the sum of RM287,850 and RM10,460 pursuant to letter dated 17 October 1994 from the plaintiff to the defendant.

[12] Findings And Decision

Whether The Application Forms For The Cashier's Orders Particulars Whereof Stated Below Were Signed By The Plaintiff's Authorized Signatories Namely Kazuro Moriki And Encik Zambri Ismail

	Cashiers No. Order	Date of Cashiers Order	Amount
i.	117140	20.12.2005	RM 43,620.00
ii.	117186	27.12.2005	RM 82,320.00
iii.	117187	27.12.2005	RM 68,630.00
iv.	118230	5.1.2006	RM 93,280.00
			RM287,850.00

[13] Both Encik Zambri Ismail (PW1) and Mr Kazuro Moriki (PW2) gave evidence during the trial. PW1 is the Assistant General Manager of the plaintiff company. He confirmed that the plaintiff is a customer of the defendant and had opened a current account on 9 August 1994. The defendant have been mandated to honour all cheques and also issue cashier's orders subject to the condition that the cheques and the application for the cashier's orders were signed by the plaintiff's authorized signatories.

[14] PW1 explained that the cashier's orders were usually used to pay for duties to government agencies in particular the customs department. In his witness statement PW1 further explained that payment to government agencies have to be by way of banker's draft or cashier's order. He also confirmed that every time an application was made to the defendant for the issuance of a cashier's order it is invariably for payment to the customs department. This is evidenced from P12, P14, P16, P18, P20, P22 and P24. PW1 is very familiar with the process as he is one of the authorized signatories for the application of the cashier's order from the defendant.

[15] When the plaintiff discovered the forged documents on 6 January 2006 they had immediately made a police report and notified the defendant. The plaintiff notified the defendant to stop payment of the cashier's orders by way of a letter dated 6 January 2006.

[16] PW1 was informed by a staff that on 6 January 2006 of a phone call from an individual name Richard who had informed her that he had received Cashier's Order No. 118229 for RM75,400 from the plaintiff made payable to Jasmeen Sdn Bhd. Upon checking PW1 discovered that the plaintiff had not given any authorization or applied for the issuance of that cashier's order from the defendant for the said sum of RM75,400. PW1 conducted an internal investigation and further discovered that between the months of December 2005 and January 2006 there were various cashier's orders issued by the defendant without the plaintiff's mandate.

[17] The defendants stopped payments for the following cashier's orders:

(i) No. 117067 - RM6,200

(ii) No. 117138 - RM2,130

(iii) No. 117185 - RM2,130

(iv) No. 118228 - RM62,320

(v) No. 118229 - RM75,400

[18] However cashier's order Nos. 117068 and 117139 for the sums of RM26,300 and RM62,328 respectively were returned.

[19] The following cashier's orders were cleared for payment:

(i) No. 117140 - RM43,620

(ii) No. 117186 - RM82,320

(iii) No. 117187 - RM68,630

(iv) No. 118230 - RM93,280

[20] The payments were made to AM Yields Sdn Bhd and Ambang Waja Sdn Bhd PW1 in his witness statement states that the plaintiff do not have any dealings whatsoever with the said companies and neither were there any amount owing to them.

[21] With regards to Cashier Orders Nos. 118228 and 118229 the sums were credited back to the plaintiff's account. Cashier Orders Nos. 117067, 117138 and 117185 the plaintiff did not want to credit back the sum as the plaintiff had refused to sign a letter of indemnity.

[22] PW1 gave evidence that the defendant had not requested for a letter of indemnity for Cashier Orders Nos. 118228 and 118229 even though the said sums were credited into the plaintiff's account.

[23] PW1 gave evidence that the person authorized to collect the cashier's orders for the plaintiff has always been a member of the staff, one Faizal bin Abdul Ghaffar. Faizal is also well known to the defendant's staff as well as DW1. The documents on pp. 16, 18, 20, 24, 28, 30 part 1 common bundle of documents are some of the cashier's orders collected by Faizal.

[24] The evidence of PW1 is supported by the evidence of PW2, Mr Kazuro Moriki, and the general manager of the Business Development Group of MOL Logistic in Japan. He was the managing director of the plaintiff from January 2005 to July 2008. PW2 confirmed that any applications for the issuance of the cashier's order were signed by the authorized signatories of the plaintiff. In his witness statement he also reiterates that all payments to government agencies such as the custom department were by way of a banker's draft or cashier's order.

[25] PW2 who signs his signature in Kanji (Japanese character) confirmed the signature on the cashier's orders in dispute were not his signature. During cross examination PW2 agreed that the signatures in P61E, P61F, P61H and P61K appeared like his signature but they are not his signatures as he did not sign the forms. He also confirmed that the plaintiff did not have any dealings with the companies the cashier's order was made out to and there was no payment due whatsoever from those companies. Furthermore Yap Chiew Teik is not an employee neither is he known to the plaintiff or to PW2. The defendant never confirmed with the plaintiff whether they had allowed Yap Chiew Teik to collect the cashier's orders. PW2 also gave evidence that it has always been one Encik Faizal Abd Gafar, an employee of the plaintiff who was duly authorized to collect the cashier's order.

[26] PW3, Madam Lee Gek Kwee, a forensic scientist who is also a handwriting expert was requested by the plaintiff to examine the four application forms which had the signatures purportedly to be that of PW1 and PW2. In her report (p. 71-72 CBD) PW3 said that she found the signatures of PW1 and PW2 have been made with toner and not original handwritten and inked signatures. It is PW3's findings that there are significant differences between all the questioned signatures and the specimen in respect of the formation and the alignment of strokes and she concluded that the signatures purportedly of PW1 are copies reproduced from genuine signature and that eight toner produced signatures of PW2 are copies from signatures that were not made by PW2.

[27] PW3 in her witness statement said that a bank teller or a manager whose duty is to verify the authenticity of a signature will be able to spot the difference between a handwritten inked signature and a signature produced by printing. During cross

examination was asked by the learned counsel for the defendant whether a normal sighted person be able to determine whether the signature was written by ink otherwise. PW3 gave evidence as follows:

> You may be able to. First of all I did not really see myself. It depends on how well toner signature was produced. Sometime the toner glossy ... sometime from loose powder. In these four originals because of my eyesight I could not see this.

[28] The reason she had to explain was because she was asked during cross examination methods and the instrument that she had used when examining the signatures. PW3 gave evidence that she had used a microscope which can magnify 4 to 20 times. PW3 at the time when she conducted the examination was in her sixties. That is the reason why she had to use the magnifier to conduct the examination. PW3 was also asked during cross examination whether it would be possible to detect that the signature was toner based:

> Q: Would you agree with me without the microscope you would not be able to detect the signature was toner based?
>
> A: I already suspected it would be produced by printing. The strokes very regular ... In my case without microscope I would not be able to.

[29] PW3 when reexamined by the learned counsel for the plaintiff she was asked whether a bank teller or a bank manager with some training would be able to detect PW3's reply was,

> A person who looks closely may be able to spot that it is toner than the inked based signature.

[30] No expert witness was called by the defendant to rebut PW3's evidence. DW1, the assistant vice president of the defendant and DW2, the senior manager, Operation 1 of the plaintiff gave evidence that there are no differences at all. DW2 in Q29/A29 in his Witness Statement had said that,

> There are no discernable differences at all.

[31] However when he was cross examined he conceded that there is a discernable difference in the 2nd and 3rd characters of PW2 signatures on the said application forms when compared with the specimen card.

[32] The standard of proof in a case involving forgery is on a balance of probabilities as established by the Supreme Court in the case of *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31:

> The standard of proof required in a case of forgery on the facts of such a case as the one before the Court is not that of beyond reasonable doubt, but of a balance of probabilities.

[33] In *Tai Soon Heng*'s case the appellant carries on banking business with a branch at Jalan Ipoh, Kuala Lumpur. The respondent was a customer of the appellant having an account at the said branch. The respondent's account No. 20-090 with the appellant was opened on 25 January 1978, by means of a document intituled "account opening form". A directors' circular resolution dated 16 January 1978, accompanied the respondent's application to open the account and in it any two of the respondent's three directors were nominated as the authorised signatories to operate the account. One Wong Chow Seng ("Wong") was the respondent's accounts clerk and between November 1979 and November 1982 forged several cheques of the respondent drawn on the appellant bank. All these cheques were honoured by the appellant and the respondent's account with it was debited in consequence. Wong was not an authorised signatory to negotiable instruments, including cheques, drawn by the respondent on the appellant.

[34] The respondent employed a new accounts clerk who, in December of that year, discovered the fraud perpetrated by Wong. Consequently on 9 December 1982, the respondent lodged a police report complaining of the forgeries that had been discovered as at that date. Further forgeries were later discovered and it transpired that a total of 97 cheques had been forged, all of which had been honoured by the appellant. The trial judge found the cheques to have been forged, and applying the decision of the Privy Council in *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd & Ors* [1985] 3 WLR 317 gave judgment for the respondent. The bank appealed to the Supreme Court. The Supreme Court dismissed the appeal and held that:

> A banker's business, of its very nature, exposes him daily to this peril. His contract with his customer requires him to accept possession of cheques delivered to him by his customer, to present them for payment to the banks on which the cheques are

drawn, to receive payment of them and to credit the amount thereof to his own customer's account, either on receipt of the cheques themselves from the customer, or on receipt of actual payment of the cheques from the banks on which they are drawn. If the customer is not entitled to the cheque which he delivers to his banker for collection, the banker, however, innocent and careful he might have been, would at common law be liable to the true owner of the cheque for the amount of which he receives payment, either as damages for conversion or under the cognate cause of action, based historically on assumpsit, for money had and received.

So strict a liability, so absolute a duty, on bankers would have discouraged the development of banking business. It was accordingly progressively mitigated by statute, first by s. 82 of the Bills of Exchange Act, 1882, then by the Bills of Exchange (Crossed Cheques) Act, 1906, and finally by s. 4 of the Cheques Act 1957.

Therefore, at common law a banker who pays out on a forged instrument drawn on his customer's account is absolutely liable to make good the loss. It is no answer for him to say that he was unaware of the forgery or that he took reasonable care. The forged instrument is a nullity and a banker has no authority, actual or implied, from his customer to act upon it. The common law has been codified in s. 24 of the Bills of Exchange Act 1949, which creates a limited exception in favour of a banker.

[35] The standard of proof in cases involving forgery is proof on a balance of probabilities. Section 45 of the Evidence Act 1950 provides that:

When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identify or genuineness of handwriting or finger impressions, the opinions upon the point of persons specially skilled in the foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts.

[36] In *Tai Soon Heng*'s case on the question of forgeries and expert evidence the Supreme Court said that:

In holding that the cheques were forgeries, the trial Judge had not abdicated his function by allowing the expert to determine the question, which is a question of fact, as to whether the signatures were forgeries. (b) The respondent had in the expert's evidence in-chief adduced sufficient evidence that supported the expert's conclusion on the question of whether the cheques were forged.

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> In a civil case and more so in a criminal case, the evidence of an expert on handwriting unsupported by cogent data showing the process by which he came to his conclusion is not worth the paper on which it is written and any reliance upon such evidence would constitute a serious misdirection warranting interference by an appellate tribunal.

B

[37] The evidence by a handwriting expert can never be conclusive because it is only opinion evidence. It is trite law that the principal object of expert evidence is merely to assist the court to form its own opinion. The Federal Court in the case of *Dr Shanmuganathan v. Periasamy Sithambaram Pillai* [1997] 2 CLJ 153 referred to the Supreme Court of India's decision in the case of *Murarilal v. State of MP* AIR [1980] SC 531, 534 where it was held that:

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D

> ... the science of identification of handwriting is not nearly so perfect and the risk is, therefore, higher. But that is a far cry from doubting the opinion of a handwriting expert as an invariable rule and insisting upon substantial corroboration in every case, howsoever the opinion may be backed by the soundest of reasons. It is hardly fair to an expert to view his opinion with an initial suspicion and to treat him as an inferior sort of witness ... His opinion has to be tested by the acceptability of the reasons given by him. An expert deposes and not decides. His duty is "to furnish the Judge with the necessary scientific criteria for testing the accuracy of his conclusion, so as to enable the Judge to form his own independent judgment by the application of these criteria to the facts proved in evidence."

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[38] However in the instant case PW3, the forensic expert, had given clear and unwavering testimony with regard to the authenticity of the signatures of PW1 and PW2. She had tendered her report of her findings that the signatures were forged. PW3 explained clearly the process by which she came to her conclusion and finding that the signatures were forged. Her evidence was not challenged by the defendant. Based on the evidence the plaintiff detected the forgery very fast and immediately upon realizing that there were cashier's orders with signatures that could have been forged they had made a police report and also sent the signatures to be examined by an expert. PW1 had also conducted an internal investigation. PW1 and PW2 had also testified that they had not signed the said cashier's orders. I find them to be credible witnesses and both gave clear and consistent testimony.

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[39] Therefore based on the totality of the evidence of PW3 together with the testimony of PW1 and that of PW2 I am satisfied on the balance of probabilities that the signatures of PW1 and PW2 on the four cashier's orders were forged signatures.

Whether Or Not The Co When Ready Were Duly Collected By An Authorized Personnel Of The Plaintiff In Accordance With Agreed Practice In That The Defendant Would Be Furnished With The Details Of The Plaintiff's Employees Who Would Collect The Cos And Acknowledge Receipt Of The Same By Signing On The Application For Cos Forms And Using The Appropriate Rubber Stamp

[40] PW1 and PW2 gave evidence that the person authorized to collect the cashier's orders for the plaintiff has always been a member of the staff, one Faizal bin Abdul Ghaffar. Faizal is also well known to the defendant's staff. DW1 during cross examination gave evidence that he knows Faizal the office boy of the plaintiff who is authorized to collect the cashier's orders:

> I know the Plaintiff's company. I know the office boy of the Plaintiff. Yes one of them is Faizal Abdul Ghaffar.

[41] When DW1 was asked to name the other office boys that came to collect he said:

> I cannot pin point... the company just authorized Mohd Faizal or Zambri to collect.

[42] The plaintiff has been a regular customer of the defendant and both PW1 and PW2 had given evidence that the cashier's order have only been for payments to Government agencies, namely the customs department. PW1 and PW2 had both given evidence that only Faizal was authorized to collect the cashier's orders from the defendant. That was the regular practice or routine throughout the years. This was confirmed by DW1 who knew Faizal and acknowledged that it would either be Faizal or Zambri that would come to collect the cashier's order. Yet, when another person came to collect the cashier's order the defendant did not take any steps to verify with the plaintiff as to the change of the person collecting and the purpose. One would expect the defendant to confirm and verify as the purpose was totally different from the regular cashier's order issued. DW1 said in his witness statement that he checks the applications made by the customers for cashier's orders and verifies the customers'

A signatures and he deals directly with the customers or their employees. He has been carrying out the same functions and duties for the past ten years. Yet when a person other than Faizal came to collect the cashier's orders it did not arouse any suspicion or occur to him to do verification.

B

[43] Based on the evidence this court finds that the cashier's orders were not duly collected by the authorized personnel of the plaintiff in accordance with agreed practice between the plaintiff and the defendant. It was agreed that the defendant would be C furnished with the details of the plaintiff's employees who would collect the cashier's orders and acknowledged receipt of the same by signing on the application forms and using the appropriate rubber stamp. It was not a one-off request or mandate given by the plaintiff to the defendant. It was regular and clear practice D accepted by the parties. DW1 gave evidence that he was very familiar with the plaintiff's company and the mandate given. He knew that the cashier's orders were normally collected by Faizal, a staff of the plaintiff. However he did not make any verification or confirmation with the plaintiff when someone other than Faizal E came to collect. As a banker DW1 and DW2 should have been more alert and proactive. They should have exercised reasonable skill and care by verifying with the plaintiff if there were any changes in the practice.

F *Whether Or Not The Defendant Is Entitled To Debit The Plaintiff's Account In The Sum Of RM287,850 And RM10,460 Pursuant To P58 Notwithstanding That The Seven Impugned Application Forms For The Cos Contained Forged Signatures Of The Plaintiff's Authorized Signatories And Whether The Defendant Is Indebted To The Plaintiff In The Cumulative Sum Of RM298,310*

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[44] At common law, the liability of a banker is founded on the tort of conversion, which is a tort of strict liability. A banker who pays out on a forged instrument drawn on his customer's account is absolutely liable to make good the loss. The liability of a banker H is founded on the tort of conversion and a banker who pays out on a forged instrument drawn on his customer's account is absolutely liable to make good the loss. In *United Asian Bank Bhd. v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31; [1993] 2 BLJ 8 the court said:

I

> At common law, a customer owes his banker only two duties. The first is to refrain from drawing a cheque in such a manner as may facilitate fraud or forgery. The second is a duty to inform the bank of any forgery of a cheque purportedly drawn on the account as soon as the customer becomes aware of it. There does not exist, at common law, a further duty on the part of a customer to take precautions in the general course of his business to prevent forgeries on the part of his servants. Neither is there at common law, in the absence of a contract to the contrary, a duty imposed upon the customer to inspect his periodical bank statements to ensure that his account is being properly maintained by the bank.

[45] This common law principle has been codified under the Bills of Exchange Act 1949. Section 24 of the Bills of Exchange Act 1949, reads:

> Subject to the provisions of this act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefore or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority:
>
> > Provided that nothing in this section shall effect the ratification of an unauthorized signature not amounting to a forgery.

[46] Under this aforementioned provision a customer cannot even recover if he has represented to his banker that the forged signature is effective and that the instrument is accordingly good for payment.

[47] However, s. 73A of the same Act provides as follows:

> Notwithstanding section 24, where a signature on a cheque is forged or placed thereon without the authority of the person whose signature it purports to be, and that person whose signature it purports to be knowingly or negligently contributes to the forgery or the making of the unauthorized signature, the signature shall operate and shall be deemed to be the signature of the person it purports to be in favour of any person who in good faith pays the cheque or takes the cheque for value.

[48] The duty of the bank is to honour its customer's cheques if there are sufficient funds. At common law, a customer owes his banker only two duties. The first is to refrain from drawing a cheque in such a manner as may facilitate fraud or forgery. The second is a duty to inform the bank of cheque purportedly drawn on the account as soon as the customer becomes aware of it. This principle to my mind should also apply to cashier's orders too. In this instant case the signatures were forged and the plaintiff upon discovering that the signatures were forged had promptly notified the bank and immediately made a police report. The plaintiff even conducted an internal investigation and had even contacted the companies the cashier's orders were made out to.

[49] The defendant contends that the plaintiff is not entitled to bring this claim as the plaintiff had undertaken and agreed to indemnify the defendant by a letter of authority dated 17 October 1994. The defendant further asserts that having executed the said letter the plaintiff is therefore liable to indemnify and as such the plaintiff is liable to bear the losses and cannot claim against the defendant. Even if the signatures are forged by virtue of the letter of authority the defendant is not liable.

[50] Arifin Zakaria J (as he then was) in *Proven Development Sdn Bhd v. Hongkong & Shanghai Banking Corp* [1998] 5 CLJ 644 referred to the case of *The Kepitigalla Rubber Estates Ltd v. The National Bank of India Ltd* [1909] 2 KB 1010 where the court had emphasized that the duty of customer of the bank in issuing mandates to the bank is to take reasonable care so as not to mislead the bank. However beyond the care which must be taken in or immediately connected with the transaction itself, there is no duty on the part of customer to take precaution in the general course of carrying on his business to prevent forgeries on the part of his servants.

[51] In *Tai Hing Cotton Mill Ltd v. Lin Chong Hing Bank Ltd* [1986] AC 80 an accounts clerk forged the managing director's signature on about 300 cheques purporting to be drawn by the company totalling approximately HK 5.5 million. The banks honoured the cheques on presentation and debited them against the company's accounts. The company's system of internal financial control was not adequate to prevent or detect forgery

and so the forgeries were not discovered until a later date. In the suit filed by the company against the three defendant banks, the Privy Council in allowing the appeal by the company held, *inter alia*:

(i) By authority, the only duties in connection with the operation of a current bank account that a customer owed to his bank, in the absence of express agreement, were a duty to exercise due care in drawing cheques so as not to facilitate fraud or forgery, and a duty to notify the bank immediately of any unauthorised cheques of which he became aware, that no wider duty, requiring a customer to take reasonable precautions in the management of his business to prevent forged cheques being presented to the bank for payment, or to take such steps as a reasonable customer would to check the periodic bank account of any items which were not, or might not have been, authorised, could be implied into banking contracts as a necessary incident of the relationship of banker and customer; and that, therefore, the banks were not relieved by any breach of duty by the company from having to bear the loss occasioned by the forged cheques.

(ii) That since the company was not in breach of any express or implied duty owed to the banks it was not estopped from asserting that the accounts had been incorrectly debited, and that, accordingly, the banks not having authority to pay the forged cheques or debit them to the company's account had to pay those sums to the company together with interest from the date the writ was issued even though the accounts were not interest bearing.

[52] Even though in this case it did not involve cheques but cashier order the same principles should apply. From the facts it is clear that the plaintiff have taken due care so as not to facilitate fraud. The moment they discovered the forged cashier's orders they had conducted an internal investigation and immediately informed the bank. If the defendant had been more vigilant and realized something was amiss as the plaintiff's authorized person to collect and the purpose of the cashier's orders were different from usual and normal practice the forged cashier's orders would not have resulted in the plaintiff's account being debited. The Supreme Court in *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31 said that:

That mutual duties of care are owed by banker and customer is beyond question. The duty is a continuing one to act with reasonable care to ensure the proper working of the account. The duty of the bank is to know the customer's signature and to pay without delay upon the authority created by the cheque and in conformity with the mandate constituted by the directions found in the cheque. But payments may be delayed for a reasonable time to permit a reference to the drawer. The customer must use reasonable care in drawing the cheque so that the bank will not be misled. However, in ordinary circumstances, compliance with his duty does not require the customer to contemplate the possibility of either an authorization or mandate being forged. He is thus under no duty to exercise reasonable care in the general course of carrying on business to prevent forgery on the part of an employee. On the other hand, the duty of the bank would require it to report to the customer any rejection by it of a cheque as being forged, so as to enable the customer to enquire into, and protect himself against, the circumstances of the supposed forgery. Should such a report be communicated so that the customer became aware that forged cheques were being presented to his banker, discharge of his duty of care would demand his informing the banker of that fact. The corollary of this proposition is that silence in the face of a duty to speak may give rise to an estoppel. These propositions emerge from a consideration of such cases as *Colonial Bank of Australasia Ltd v. Marshall* [1906] AC 559; *London Joint Stock Bank Ltd v. Macmillan*, *supra* (in so far as the opinions of the House of Lords therein expressed are not in conflict with the advice of the Privy Council in *Marshall*'s case) *Greenwood v. Martins Bank Ltd* [1932] 1 KB 371 (CA), esp per Scrutton, LJ and [1933] AC 51 (HL); *Brown v. Westminster Bank Ltd* [1964] 2 Lloyd's Rep 187; *Varker v. The Commercial Banking Co of Sydney Ltd* [1972] 2 NSWLR 967 and *National Bank of New Zealand Ltd v. Walpole & Patterson Ltd,* [1975] 2 NZLR 7.

[53] I am of the opinion that it was an implied term of the mandate that the defendant would exercise reasonable skill and care in the execution of the plaintiff's orders which the plaintiff may make on the defendant from time to time. The indemnity is effective only if the defendant was not negligent and had complied with the mandate as agreed upon.

[54] Based on the facts and evidence adduced there are evidence of negligence on the part of the defendant as they had been unaware of the forgery until notified by the plaintiff.

Notwithstanding the indemnity (P58) the defendant had negligently issued the cashier's orders without authority or mandate of the plaintiff and therefore is liable to the plaintiff.

[55] Having considered the evidence adduced in its entirety together with the submissions of both counsels as well as authorities tendered in support of their respective cases I am satisfied that the plaintiff have proven their claim against the defendant on a balance of probabilities. Accordingly I allow the plaintiff claim against defendants with cost.